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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CARLOS ALBERTO GALVAN-RODRIGUEZ, Defendant and Appellant.	G055661 (Super. Ct. No. 17HF0871) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Michael J. Cassidy, Judge. Affirmed.

Eric E. Reynolds, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Robin Urbanski and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Carlos Alberto Galvan-Rodriguez of attempted second degree robbery. (Pen. Code, §§ 664, subd. (a), 211/212.5, subd. (c); all further statutory references are to this code.) The trial court suspended imposition of sentence on defendant's conviction and placed him on three years' formal probation, conditioned on serving a one-year jail term. On appeal, defendant challenges the sufficiency of the evidence to support the force or fear element of attempted robbery when he opened the passenger door of the victim's sports utility vehicle (SUV) and attempted to snatch her purse from the front seat while his two friends stood by him. Rodriguez also challenges the court's admission of his accomplice's guilty plea to attempted robbery—and the factual basis supporting the plea—as prior statements by the accomplice were inconsistent with his testimony at trial. Rodriguez further contends the court erred in refusing to give a limiting instruction directing the jury not to consider the accomplice's plea as substantive evidence of Rodriguez's guilt. Defendant's contentions provide no basis to reverse the judgment. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

One morning in June 2017, Katie D. drove her Chevrolet Suburban SUV to a hospital in Laguna Hills, where she worked as a nurse. As she neared the hospital, she drove past a parking lot in which she noticed three men walking toward the hospital. When Katie parked by the hospital, she thought her doors unlocked automatically. Her windows, except the front windshield, were tinted. She turned off the ignition to read e-mails on her phone before going to work.

After one or two minutes, she glanced up and was startled to see the same three men she had noticed earlier now standing "right at . . . , like very close" to her front passenger door. She tried to "hit the lock button," but Rodriguez, whom she identified in court, opened the door too quickly for her to stop him. Katie felt "terrified" when

Rodriguez opened the door. The other two men stood behind Rodriguez, and they were staring at her.

She screamed, "What are you doing?" Rodriguez then reached for her purse on the front passenger seat. He was looking at Katie, but she was able to grab the purse before he could touch it. Katie described her reaction as "instinctual" or "automatic." Rodriguez and the two men stood in the open doorway staring at Katie, but said nothing; then, one of the accomplices closed the car door and Katie locked it. She saw the men move off toward a nearby bus transit center.

"Shaking and a little teary," Katie watched the men in her rearview mirror to make sure they did not return. Another nurse pulled up within a few minutes and escorted Katie "very quickly" into the hospital. Katie could still see the men; she remained frightened and kept glancing over her shoulder. She testified later that it appeared the men had been drinking because their eyes were red and "glassy." She explained in her testimony that "[t]hree men standing at my car and opening my door and reaching in for my purse" caused her to feel "shocked, terrified, [and] scared."

By 7:10 a.m. that morning, deputies from the Orange County Sheriff's Department located and detained Rodriguez, Robert Wixom, and Phillip Escarrega on a bus bench. One deputy then spoke with Katie, who was still distraught about the incident. The deputy drove Katie to do an in-field show up during which she identified the three suspects.

The deputy later interviewed Escarrega, who initially denied seeing Katie or her car, and further denied any involvement in the incident. In a second interview, Escarrega admitted that he was walking in front of Rodriguez and Wixom when he heard a female "freak out" by yelling or screaming; he could not make out what she was saying. Escarrega saw that her front passenger car door was open, but he did not admit seeing who opened the door. Escarrega did not describe the incident in any manner, but stated he knew it was "all bad" and claimed he tried to separate himself from it physically by

walking away. According to the deputy, Escarrega became "mad" when he learned neither Wixom nor Rodriguez admitted responsibility because "he [Escarrega] said he knew he [Escarrega] was going to go to jail." At that point, the deputy had not told him the nature of the crime leading to his arrest.

Escarrega entered a guilty plea soon after his arrest, and the prosecutor called him as a witness at Rodriguez's trial. Escarrega testified he heard the cries of a woman that sounded agitated or distressed as he, Rodriguez, and Wixom walked to the transportation center after buying alcohol at a grocery store. Escarrega explained that he was ahead of the other two men and may have stopped "momentarily" upon hearing the noise, but he denied he stood next to Katie's car.

Escarrega's testimony then moved into areas related to his plea agreement and the factual basis he gave in his guilty plea form. Contrary to the statements in his *Tahl*[1] form, Escarrega testified he did not see Rodriguez stop near the car or open a door. Escarrega also denied any prior plan to rob or steal, testifying "[t]here was no conversation about that happening, I know that." When asked whether he, Rodriguez, and Wixom attempted "to take property from someone else through the use of force or fear," he responded, "Absolutely not."

On the prosecutor's motion and over Rodriguez's objection, the trial court admitted evidence of Escarrega's guilty plea to attempted robbery, including the *Tahl* form attachment which set forth the factual basis for his plea. As part of that factual basis, Escarrega admitted that he aided and abetted Rodriguez in committing the attempted robbery of Katie by means of force or fear and that he, Wixom, and Rodriguez had agreed to commit the crime.[2]

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[1] *In re Tahl* (1969) 1 Cal.3d 122.

[2] Specifically, the prosecutor, in questioning Escarrega about his guilty plea, quoted from his *Tahl* form as follows: "And in fact, you stated: 'In Orange County, California on June 25th, 2017, I did unlawfully, by means of force and fear, attempt to aid and abet in taking the personal property from the immediate presence of Katie D.

When the prosecutor asked Escarrega if he stated in his plea agreement that Rodriguez "personally tried to rob Katie D." as he (Escarrega) and Wixom "aided and abetted him in that attempt," Escarrega admitted, "I guess I did, yeah." While he had earlier testified he did not see Rodriguez stop at Katie's car or open her door, he later explicitly affirmed that "it was [Rodriguez] who opened the door and reached in to grab [Katie's] purse."

On cross-examination, Escarrega testified he pled guilty because he was facing an 11-year sentence due to a prior strike conviction, and the prosecutor made him a plea offer of probation with his immediate release from custody. He added he did not write the factual statement forming the basis for his plea; he signed the statement the prosecutor presented to him. Escarrega admitted he was angry at Rodriguez for putting him "in the situation at all," and acknowledged he, Wixom, and Rodriguez had been intoxicated, drinking throughout the night and the morning of the incident. On redirect, Escarrega denied he was lying when he entered his plea or that he intended his testimony to disavow his guilty plea. To the contrary, he testified that the stated factual basis underlying his plea agreement remained true because "that's what happened."

DISCUSSION

1. *Sufficiency of the Evidence*

Rodriguez challenges the sufficiency of the evidence to support the jury's conclusion he committed an attempted robbery. Specifically, he contends the evidence was insufficient to support a finding he intended to use force or fear to take Katie's purse.

The use of force or fear to take possession of a victim's property is a necessary element of robbery, and the same specific intent is required to constitute

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The attempted robbery was agreed upon during the commission of the crime with [Rodriguez and Wixom], who are also named in court case number 17HF0871.' [¶] . . . [¶] '[Rodriguez] personally tried to rob Katie D., as myself and [Wixom] aided and abetted him in that attempt.'"

attempted robbery. (*People v. Lindberg* (2008) 45 Cal.4th 1, 24.) Rodriguez argues that he did not touch either Katie or her purse, uttered no threats, and employed no force to wrest the purse from Katie; instead, he retreated when she grabbed it before he did. He also argues there was no evidence he and the two men with him intended to use fear to gain possession of the purse. We disagree.

On appeal, we must view the evidence in the light most favorable to the jury's verdict. (*People v. Lindberg, supra*, 45 Cal.4th at p. 27.) "The jury may infer a defendant's specific intent to commit a crime from all of the facts and circumstances shown by the evidence." (*Ibid.*) In light of our deferential standard of review, an appellant "bears an enormous burden" in challenging the sufficiency of the evidence. (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330 (*Sanchez*).)

Rodriguez does not meet that burden here. "[F]ear may be inferred from the circumstances" and "need not be the result of an express threat or the use of a weapon. Resistance by the victim is not a required element of robbery, and the victim's fear need not be extreme to constitute robbery. All that is necessary is that the record show conduct, words, or circumstances reasonably calculated to produce fear. [¶] Intimidation of the victim equates with fear." (*People v. Morehead* (2011) 191 Cal.App.4th 765, 775, internal citations and quotations omitted.)

The record supports the jury's conclusion Rodriguez and his cohort intended to instill fear in their victim to facilitate the taking of her purse. Katie testified she experienced significant fear on seeing three men "very close" to her front passenger door, staring at her as one opened it and reached into her vehicle. Rodriguez suggests that, instead of robbery, "the more reasonable explanation" for his actions was that in his inebriated state he saw a purse on the seat and tried to take it.

But it was the jury's province to evaluate the evidence (*Sanchez*, *supra*, 113 Cal.App.4th at p. 330), and the jury could reasonably conclude the men assembled "right at" Katie's door, as she testified, and stared at her throughout the encounter to

intimidate her. In *People v. Brew* (1991) 2 Cal.App.4th 99, 104, the show of force or intimidation inherent in a large, intoxicated defendant confronting a much smaller store clerk at her register, without a counter or barrier between them, satisfied the fear element of robbery.

The same is true here. Rodriguez opened the victim's car door, looked right at her, and attempted to take her purse as his accomplices maintained their position by the open door while also staring at her. The jury could interpret these actions as inconsistent with Rodriguez's description of an opportunistic purse theft.

Moreover, while the foregoing evidence was by itself sufficient to support the jury's verdict, there was more. Escarrega expressly stated as part of the factual basis supporting his guilty plea to attempted robbery that he, Rodriguez, and Wixom agreed to rob Katie and used force or fear in attempting to do so. After contradicting those admissions in his initial testimony at trial, Escarrega reaffirmed them. Escarrega's admission in the factual basis to his plea to an "agreed upon" plan to use force or fear to commit the crime, as well as his trial testimony reaffirming that admission, support the jury's finding regarding Rodriguez's intent to use force or fear.

2. *Admission of Escarrega's Guilty Plea and Supporting Statements*

Rodriguez argues the trial court erred by admitting evidence of Escarrega's guilty plea to attempted robbery. Rodriguez contends the plea was irrelevant to the jury's determination of *his* guilt or innocence based on the evidence presented at his trial, as opposed to evidence or circumstances that may have led Escarrega to plead guilty. Rodriguez claims the asserted error in admitting the plea was so prejudicial it constituted a due process violation depriving him of a fair trial. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70.)

In his argument, Rodriguez does not distinguish between admission of evidence of Escarrega's guilty plea and admission of the statements Escarrega gave in his *Tahl* form as the factual basis supporting that plea. Below, during a pretrial hearing,

Rodriguez's counsel anticipated that the prosecutor's "intention[] when he calls" Escarrega was "to basically ask . . . what happened and impeach [him] with [his] *Tahl* form[]" if Escarrega deviated from it. Rodriguez's counsel added, "And I don't necessarily have a problem with that," explaining, "I don't have a problem with them necessarily saying, 'You pled guilty to some facts that arose out of this case,' I think that might be proper impeachment."

Instead, counsel's approach below was to ask the trial court "to sanitize the *Tahl* forms of the mention of the actual crime," for example, by omitting the word "rob" and related terms from Escarrega's statement of the factual basis of his plea. Counsel also suggested omitting the "actual charge" to which Escarrega pleaded guilty—attempted robbery.

The prosecutor opposed defense counsel's request for two reasons. First, he argued "it is a crime of moral turpitude that can be used to impeach" Escarrega based upon what he "actually pled guilty to." And second, "the charge [he] pled guilty to . . . gives context to the plea, gives context to [the] factual basis [given] in the *Tahl* form."

The trial court denied defense counsel's motion, concluding "there's no need to sanitize" Escarrega's plea or *Tahl* form of words like "rob" or the charge to which Escarrega pleaded guilty. The court explained, "It goes along with what the factual basis is, if that's what they said they did, that's what they say they did," whether "they say it in their testimony or they say it with the factual basis."

On appeal, Rodriguez's opening brief does not assert Escarrega's plea or accompanying *Tahl* form should have been sanitized. Rather, he argues that they should have been excluded altogether. He broadly asserts that "admission of Mr. Escarrega's guilty plea was an abuse of discretion and a violation of due process." (Boldface type and capitalization omitted.)

Rodriguez relies on what he correctly describes as a "general rule" that a guilty plea or the conviction of a coparticipant in a crime is not admissible to prove the

defendant's guilt. Rodriguez cites as support for this proposition cases in which the former codefendant did not testify. (*People v. Leonard* (1983) 34 Cal.3d 183, 188-189 (*Leonard*); *People v. Neely* (2009) 176 Cal.App.4th 787, 795; *U.S. v. Mitchell* (4th Cir. 1993) 1 F.3d 235, 240.) Here, the codefendant did testify. And that makes all the difference.

In *Leonard*, for example, two men robbed two victims and the police detained the defendant in the company of a man named Steven Johnson. At the defendant's trial, the trial court admitted into evidence Johnson's pretrial guilty plea, by taking judicial notice of the fact that he had pleaded guilty to the robbery. The jury then convicted the defendant of robbery. Our Supreme Court reversed the defendant's conviction, after finding that the prejudicial effect of admitting Johnson's plea "far outweighs any probative value the evidence might have" because it "invites an inference of guilt by association . . . ." (*Leonard*, *supra*, 34 Cal.3d at p. 188.)

Here, on the other hand, the trial court did not admit the bare fact of a nontestifying former codefendant's guilty plea or conviction. Rather, the court permitted the prosecutor to introduce prior inconsistent statements by a testifying former codefendant that were contained in the factual basis for his guilty plea.

Rodriguez does not dispute that Escarrega's initial trial testimony was inconsistent with his factual basis statements on his *Tahl* form. When the prosecutor asked Escarrega at trial if he recalled "the defendant saying anything about trying to go steal or rob or do anything," he responded, "Absolutely not." But Escarrega had earlier admitted during his guilty plea colloquy that "[t]he attempted robbery was agreed upon" when he, Rodriguez, and Wixom committed the crime. Consequently, the trial court properly admitted his prior inconsistent statements relying on the hearsay exceptions contained in Evidence Code sections 1235 and 1280.

The fact that Escarrega testified, and in doing so contradicted his earlier statements underlying his guilty plea, distinguishes *Leonard* and similar cases. Unlike

those cases, there was no danger Rodriguez would be convicted here only as a result of his association with a coparticipant who had entered a prior guilty plea. Escarrega's testimony was a single evidentiary component of the trial, and it potentially weighed for and against Rodriguez. Escarrega's initial eyewitness testimony supported Rodriguez's exoneration by showing the absence of any plan to rob Katie or intent to use force or fear. The prosecutor was entitled to rebut this evidence if he could. We therefore find no merit in Rodriguez's reliance on the *Leonard* line of cases or in his broad appellate challenge to the admission of evidence related to Escarrega's guilty plea.

In his reply brief, Rodriguez contends for the first time that Escarrega's statements on his *Tahl* form—"[t]o the extent [they] constituted a prior inconsistent statement"—should have been redacted "as requested by defense counsel." Specifically, Rodriguez argues "Escarrega could still have been impeached with his prior statement" but only "if the reference to 'attempted robbery' had been redacted."

This claim is forfeited because by raising it in his reply brief and in a cursory fashion without analysis, Rodriguez deprived respondent of a meaningful opportunity to address it. (*People v. Smithey* (1999) 20 Cal.4th 936, 1017, fn. 26; *People v. Jacobs* (2013) 220 Cal.App.4th 67, 83.) In any event, we see no merit in the claim because Escarrega admitted in the factual basis for his plea the key issue contested at trial—his group's use of force and fear. He made that admission without regard to whether their conduct constituted a robbery. That is, he admitted aiding and abetting an attempt to use "force and fear . . . in *taking* the personal property from the immediate presence of Katie D." (See *ante*, p. 5, fn. 1, italics added.) The fact that subsequent statements in the *Tahl* form used the legal terminology for such a taking, including "attempted robbery" and "rob," is of no consequence. We see no possibility under any standard of review that the suggested redaction would have made a difference.

Additionally, we need not address whether the trial court's admission of Escarrega's actual guilty plea—separate and apart from admitting the prior inconsistent

statements that formed the factual basis for his plea—constituted error. The claim is forfeited because defense counsel did not make this argument at trial, instead contending that the plea should have been sanitized to omit referring to attempted robbery. Rodriguez does not reassert that claim on appeal. As a practical matter, it is not clear how the plea could have been redacted to omit the very charge to which Escarrega pleaded guilty.

Even assuming arguendo, however, that the trial court should have sanitized or even entirely excluded Escarrega's actual plea, the proper admission of the factual statements underlying the plea renders any conceivable error harmless. Once Escarrega admitted in his *Tahl* form that he agreed with Rodriguez and Wixom to take Katie's personal property, and that the men used force and fear to do so, these statements were admissible not just to impeach Escarrega's credibility, but also as substantive evidence in the trial. Rodriguez does not dispute or challenge the validity of California law permitting the use at trial of prior inconsistent statements as evidence of the defendant's guilt. "Section 1235 permits a witness' inconsistent statements to be considered as evidence of the matters stated and not merely as evidence casting discredit on the witness." (Cal. Law Revision Com. com., 29B pt. 4 West's Ann. Evid. Code (2015 ed.) foll. § 1235, p. 324.)

Given that Escarrega admitted the three men used force and fear in attempting to take Katie's purse, we see no prejudice in admitting into evidence the fact that Escarrega pleaded guilty. Rodriguez had a full and fair opportunity to confront and cross-examine Escarrega regarding his testimony about the alleged incident, his prior admissions in the *Tahl* form, and the circumstances of his plea. Indeed, in focusing on the circumstances of Escarrega's plea, defense counsel elicited numerous reasons for the jury to discredit it and regard Escarrega's trial testimony as a more accurate account of the incident. In sum, because the court properly admitted Escarrega's earlier statements admitting guilt, any error in also admitting evidence related to his guilty plea was necessarily harmless.

3. *Limiting Instruction*

Rodriguez contends the trial court erred in refusing a defense instruction barring the jury from considering Escarrega's guilty plea as evidence of Rodriguez's guilt. Referring to CALCRIM No. 335, which directs jurors to regard an accomplice's testimony with caution, the trial court rejected the request by stating "the accomplice instruction covers all that."

To the extent the instruction request was aimed at precluding the jury from considering Escarrega's prior inconsistent statements as substantive evidence of guilt in Rodriguez's trial, there was no merit to the request. (Evid. Code, § 1235.) Any error in admitting evidence related to Escarrega's guilty plea was harmless under any standard. Consequently, any error in refusing the requested instruction was also harmless.

DISPOSITION

The judgment is affirmed.

GOETHALS, J.

WE CONCUR:

ARONSON, ACTING P. J.

THOMPSON, J.